

20
2/23/07
731

SMITH LAW FIRM, P.C. Est. 1871

Attorneys at Law
26 West Sixth Avenue * P.O. Box 1691 * Helena MT 59624-1691
(406) 449-8718 * Fax (406) 449-3817
bspencer@smithlawmt.com

R.J. "Jim" Sewell, Jr.
Bruce M. Spencer
Craig D. Charlton
Scott H. Clement

February 22, 2007

Representative Veronica Small-Eastman
Montana House of Representatives
PO Box 200400
Helena, MT 59620-0400

RE: HB 731

Dear Representative. Small-Eastman:

I represent the Montana Automobile Dealers Association. Thank you for taking the time to speak with me today on HB 731. As I said in our conversation I believe that existing law addresses your concerns. I will try to walk you through how existing law applies to your bill section by section.

New Section 1

(1)(a) and (1)(b) We believe this section requires a secured party to refund to a borrower any surplus from a repossession sale. This is already required by the Uniform Commercial Code, adopted by Montana in 30-9A-608(1)(d) which states: "A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency." Sections (1)(a) and (1)(b) also do not provide for the recovery of attorney fees by the secured party and Montana's Uniform Commercial Code does permit the recovery of attorney fees, if the underlying contract permits fees. 30-9A-608(1)(a)(i).

(2)(a) This section requests the holder of a note provide "financial information" related to the resale or subsequent transfer of the vehicle. We are not sure what "financial information" entails. In addition we believe that Montana's existing Uniform Commercial Code requires disclosure of certain "financial information". MCA 30-9A-614 requires a secured party to provide notice to the debtor of the sale and in that notice state that the debtor may request in writing how the amounts to pay to avoid sale, redemption amounts, are calculated. MCA 30-9A-616 requires a secured party to provide detailed information about how a deficiency balance is calculated after a sale including:

1. the total amount of the debt; 2. the gross proceeds from sale; 3. the net amount of the debt after applying sale proceeds; 4. the amount of expenses, including repossession, sale, attorney fees, and processing expenses; 5. the amount and type of credits that the debtor is known to be entitled to that are not reflected in the total amount of debt; and 6. the total amount of surplus or deficiency.

If this explanation is not supplied the consumer is entitled to a free explanation or if it was lost the consumer can request it at a cost of \$25.

(2)(b) This section says that the financial information may not include personal information as defined in MCA 61-11-503. That statute includes name and address as personal information. Necessarily a secured party will send the requested information by mail and it must include the name and address of the debtor. We see this as a problem.

Section 2

(4)(b)(i) As discussed above Montana's Uniform Commercial Code already requires disclosure. Even if property is obtained by pre-judgment attachment, it still must be sold pursuant to Montana's Uniform Commercial Code, and thus the disclosures you seek are already provided for in law.

(7)(b) I do not believe that the department ever has any financial information about a repossession sale, and again Montana's Uniform Commercial Code already provides for disclosure.

Section 3

(4) I am not sure the department has any of this information, and Montana's Uniform Commercial Code requires disclosure from the secured party.

Section 4

(4)(a) The same comments we made in (2)(a) and (2)(b) above apply here as well. In addition this section uses the term "financial records associated with the motor vehicle" but does not define what "financial records" are, this is quite broad. Again, we believe that existing law addresses your concern.

Section 5

(2) The Montana Automobile Dealers Association never condones a dealer who fails to pay off a trade in. During my 13 years of representing Dealers I am only aware of one instance where a franchised Dealer failed to pay off a trade in. That Dealer is now in bankruptcy and may face further civil or criminal prosecutions as a result of their actions.

Consumers do have a remedy in existing law for this problem. Each and every dealer, whether they sell new or used cars, must purchase a bond. MCA 61-4-101(7) The consumer can make a claim on this bond if the dealer fails to pay off the lien. We believe the consumer can also seek punitive damages as a result of the failure to pay off the lien.

Letter to Representative Small-Eastman
February 22, 2007
Page 3

I have also represented secured parties who have made claims on the bond as opposed to suing the underlying debtor. Banks in my experience do not wish to sue the debtors in this instance.

Debtors also have remedies under the federal Fair Credit Reporting Act to clear up a credit report damaged as a result of a lien not being paid on a trade-in.

I hope this has addressed your concerns. As you can see we believe that existing law is adequate to address your concerns. The Montana Automobile Dealers Association does not believe that any additional legislation is necessary.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Bruce M. Spencer', with a long horizontal flourish extending to the right.

BRUCE M. SPENCER
Attorney at Law

BMS/le
enclosure
Our File # 11037

Montana Code Annotated 2005

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

30-9A-608. Application of proceeds of collection or enforcement -- liability for deficiency and right to surplus. (1) If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(a) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under 30-9A-607 in the following order to:

(i) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorneys fees and legal expenses incurred by the secured party;

(ii) the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(iii) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand under subsection (1)(a)(iii).

(c) A secured party need not apply or pay over for application the noncash proceeds of collection and enforcement under 30-9A-607 unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) A secured party shall account to and pay a debtor for any surplus, and the obligor is liable for any deficiency.

(2) If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus and the obligor is not liable for any deficiency.

History: En. Sec. 105, Ch. 305, L. 1999; amd. Sec. 19, Ch. 179, L. 2001; Sec. , MCA 1999; redcs. 30-9A-608 by Code Commissioner, 2001.

Provided by Montana Legislative Services

Montana Code Annotated 2005

[Previous Section](#)
 [MCA Contents](#)
 [Part Contents](#)
 [Search](#)
 [Help](#)
 [Next Section](#)

30-9A-614. Contents and form of notification before disposition of collateral -- consumer-goods transaction. In a consumer-goods transaction, the following rules apply:

- (1) A notification of disposition must provide the following information:
 - (a) the information specified in 30-9A-613(1)(a);
 - (b) a description of any liability for a deficiency of the person to which the notification is sent;
 - (c) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under 30-9A-623 is available; and
 - (d) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.
- (2) A particular phrasing of the notification is not required.
- (3) The following form of notification, when completed, provides sufficient information:
 [Name and address of secured party]
 [Date]

NOTICE OF OUR PLAN TO SELL PROPERTY

[Name and address of any obligor who is also a debtor]

Subject: [Identification of Transaction]

We have your [describe collateral], because you broke promises in our agreement.

[For a public disposition:]

We will sell [describe collateral] at public sale. A sale could include a lease or license. The sale will be held as follows:

Date:

Time:

Place:

You may attend the sale and bring bidders if you want.

[For a private disposition:]

We will sell [describe collateral] at private sale sometime after [date]. A sale could include a lease or license.

The money that we get from the sale (after paying our costs) will reduce the amount you owe. If we get less money than you owe, you [will or will not, as applicable] still owe us the difference. If we get more money than you owe, you will get the extra money, unless we must pay it to someone else.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at [telephone number].

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] or write us at [secured party's address] and request a written explanation. [We will charge you \$ for the explanation if we sent you another written explanation of the amount you owe us within the last six months.]

If you need more information about the sale call us at [telephone number] or write us at [secured

party's address].

We are sending this notice to the following other people who have an interest in [describe collateral] or who owe money under your agreement: [Names of all other debtors and obligors, if any]

[End of Form]

(4) A notification in the form of subsection (3) is sufficient, even if additional information appears at the end of the form.

(5) A notification in the form of subsection (3) is sufficient, even if it includes errors in information not required by subsection (1), unless the error is misleading with respect to rights arising under this chapter.

(6) If a notification under this section is not in the form of subsection (3), law other than this chapter determines the effect of including information not required by subsection (1).

History: En. Sec. 111, Ch. 305, L. 1999; Sec. , MCA 1999; reds. 30-9A-614 by Code Commissioner, 2001.

Provided by Montana Legislative Services

Montana Code Annotated 2005

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

30-9A-616. Explanation of calculation of surplus or deficiency. (1) In this section, the following definitions apply:

(a) "Explanation" means a writing that:

(i) states the amount of the surplus or deficiency;

(ii) provides an explanation in accordance with subsection (3) of how the secured party calculated the surplus or deficiency;

(iii) states, if applicable, that future debits, credits, charges, including additional credit service charges or interest rebates, and expenses may affect the amount of the surplus or deficiency; and

(iv) provides a telephone number or mailing address from which additional information concerning the transaction is available.

(b) "Request" means a record:

(i) authenticated by a debtor or consumer obligor;

(ii) requesting that the recipient provide an explanation; and

(iii) sent after disposition of the collateral under 30-9A-610.

(2) In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under 30-9A-615, the secured party shall:

(a) send an explanation to the debtor or consumer obligor, as applicable, after the disposition and:

(i) before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency; and

(ii) within 14 days after receipt of a request; or

(b) in the case of a consumer obligor who is liable for a deficiency, within 14 days after receipt of a request, send to the consumer obligor a record waiving the secured party's right to a deficiency.

(3) To comply with subsection (1)(a)(ii), a writing must provide the following information in the following order:

(a) the aggregate amount of obligations secured by the security interest under which the disposition was made, and if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact, calculated as of a specified date:

(i) if the secured party takes or receives possession of the collateral after default, not more than 35 days before the secured party takes or receives possession; or

(ii) if the secured party takes or receives possession of the collateral before default or does not take possession of the collateral, not more than 35 days before the disposition;

(b) the amount of proceeds of the disposition;

(c) the aggregate amount of the obligations after deducting the amount of proceeds;

(d) the amount, in the aggregate or by type, and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorneys fees secured by the collateral that are known to the secured party and relate to the current disposition;

(e) the amount, in the aggregate or by type, and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and that are not reflected in the amount in subsection (3)(a); and

(f) the amount of the surplus or deficiency.

(4) A particular phrasing of the explanation is not required. An explanation complying substantially with the requirements of subsection (1)(a) is sufficient, even if it includes minor errors that are not seriously misleading.

(5) A debtor or consumer obligor is entitled without charge to one response to a request under this section during any 6-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to subsection (2)(a). The secured party may require payment of a charge not exceeding \$25 for each additional response.

History: En. Sec. 113, Ch. 305, L. 1999; Sec. , MCA 1999; redes. 30-9A-616 by Code Commissioner, 2001.

Provided by Montana Legislative Services

Montana Code Annotated 2005

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

61-11-503. Definitions. As used in this part, the following definitions apply:

- (1) "Disclose" means to engage in any practice or conduct that makes available or known, by means of any communication to another person, organization, or entity, personal information contained in a motor vehicle record.
- (2) "Express consent" means an affirmative authorization given in writing by a person to whom personal information pertains that specifically allows the department to release personal information to another person, organization, or entity. Consent may be conveyed electronically if the conveyance includes an electronic signature, as defined in 2-20-103, from the person to whom the personal information pertains.
- (3) "Highly restricted personal information" means an individual's photograph or image, social security number, or medical or disability information.
- (4) "Motor vehicle record" means any record maintained by the department that pertains to a driver's license, commercial driver's license, driving permit, motor vehicle title, motor vehicle registration, or identification card issued by the department.
- (5) "Person" does not mean a state agency or local government entity.
- (6) (a) "Personal information" means information that identifies a person, including a person's name, address, telephone number, social security number, driver's license or identification number, date of birth, photograph or image, and medical or disability information.
(b) The term does not include the five-digit zip code of an address, information on vehicular accidents, driving or equipment-related violations, a person's driver's license or vehicle registration status, or a vehicle's insurance status.
- (7) "Record" includes all books, papers, photographs, photostats, cards, film, tapes, recordings, electronic data, printouts, or other documentary materials, regardless of physical form or characteristics.

History: En. Sec. 3, Ch. 363, L. 2001; amd. Sec. 4, Ch. 533, L. 2003.

Provided by Montana Legislative Services

Montana Code Annotated 2005

[Previous Section](#) [MCA Contents](#) [Part Contents](#) [Search](#) [Help](#) [Next Section](#)

61-4-101. Dealer's license -- types of licenses and terms -- plates -- bonds -- zoning. (1) Except as provided in [61-4-125](#), a person may not engage in the business of buying, selling, exchanging, accepting on consignment, or acting as a broker of a new motor vehicle or used motor vehicle, new or used recreational vehicle, motor home, trailer (except a trailer having an unloaded weight of less than 500 pounds), travel trailer, semitrailer, pole trailer, motorcycle, quadricycle, or special mobile equipment that is not registered in the person's name unless the person is the holder of a dealer's license issued by the department under this part.

(2) (a) The department is authorized to issue a dealer's license for one or more specified vehicle types to any person it determines is qualified to hold a license under the provisions of this section. A dealer's license may be issued for and restricted to one or more of the following vehicle types:

- (i) new motor vehicles, including new trucks, buses, and light vehicles covered under the franchise the dealer holds as franchisee and used trucks, buses, recreational vehicles, light vehicles, and trailers;
- (ii) used motor vehicles, including used trucks, buses, and light vehicles;
- (iii) new recreational vehicles, including new motor homes and travel trailers covered under the franchise the dealer holds as franchisee and used motor homes and travel trailers;
- (iv) used recreational vehicles, including used motor homes and travel trailers;
- (v) trailers, including semitrailers and pole trailers, but excluding travel trailers;
- (vi) special mobile equipment; or
- (vii) motorcycles or quadricycles, including new or used motorcycles or quadricycles, but excluding new off-highway vehicles unless the dealer is licensed under Title 23.

(b) The department shall design and issue dealer and demonstrator plates as provided in [61-4-102](#) and [61-4-129](#).

(c) A dealer licensed for a particular type of vehicle may sell, trade, or accept on consignment only vehicles of the type for which the license is authorized under subsection (2)(a).

(d) Subject to the provisions of [61-4-124](#), a dealer's license issued by the department is valid until:

- (i) voluntarily returned to the department for surrender and cancellation upon the cessation of the dealer's business operations; or
- (ii) suspended or revoked for a violation of this chapter or any other laws relating to the sale of motor vehicles.

(3) (a) An applicant for a dealer's license shall submit a written application for a dealer's license to the department, specifying the type or types of dealer's license sought. The application must be signed by the applicant and contain a verification by the applicant, under penalty of law, that the information contained in the application is true and correct. Any information provided in the license application process is subject to independent verification by the department or an authorized representative of the department.

(b) After examining a license application and conducting an investigation necessary to verify the information contained in the application and if the department is satisfied that the applicant qualifies for the issuance of a license under the provisions of this chapter, the department may issue the license. The department may refuse, after examination and investigation, to issue a license to an applicant who is not qualified for licensure or whose prior financial or other activities or criminal record, as determined by the department:

- (i) poses a threat to the effective regulation of dealers, wholesalers, or auto auctions;
- (ii) poses a threat to the public interest of the state; or

(iii) creates a danger of illegal or deceptive practices being used in the conduct of the proposed dealership, wholesaler, or auto auction.

(4) To be qualified for licensure as a dealer, an applicant shall provide to the department the following:

(a) the name under which the applicant intends to conduct business and the name, address, date of birth, and social security number of any person who possesses or will possess an ownership interest in the business for which the license is sought. If the applicant is a corporation, the personal information required in this subsection (4)(a) must be provided for each corporate officer and the person designated by the corporation to manage or oversee the dealership.

(b) for each person subject to the provisions of subsection (4)(a), information concerning whether the person has:

(i) an ownership interest in a vehicle dealership or a wholesaler business in Montana or another jurisdiction and, if so, the name and address of each dealership or wholesaler; and

(ii) been found guilty of, or pleaded guilty to, a felony in this or any other jurisdiction and, if so, shall provide a summary of the conduct resulting in the felony charge, including the dates of the conduct and any court proceedings pertaining to the conduct and the name and address of any court in which the matter was heard;

(c) the name, address, and telephone number of the insurance carrier from whom the applicant has acquired general liability insurance, naming the department as a certificate holder of the policy, and the name, address, and telephone number of the local insurance agent for the carrier and the applicant's policy number. The insurance must cover any vehicle bearing dealer or demonstrator license plates that is offered for demonstration or loan to a customer or otherwise operated by a customer in the regular course of the applicant's business and must be for a minimum of 1 year;

(d) the geographic location of the physical lot or lots upon which vehicles will be displayed for sale and of a permanent nonresidential building that will be maintained to store the actual physical or electronic records resulting from the purchase, sale, trade, or consignment of vehicles for which licensure is sought. An applicant may use more than one location to display vehicles for sale if the maximum distance between each display lot does not exceed 200 feet and if the distance between a display lot and the building in which vehicle sales records are stored does not exceed 1,000 feet.

(e) for each geographic location specified in the application, evidence of the applicant's compliance with applicable local land use planning, zoning, and business permitting requirements, if any. Evidence of compliance may be documented by means of a written verification of compliance signed by the authorized representative of the local land use planning or zoning board or the local business-permitting agency.

(f) a diagram or plat showing the geographic location, lot dimensions, and building and sign placement for the applicant's proposed established place of business, along with two or more photographs of the geographic location, building premises, and sign, as prescribed by the department;

(g) a certification by the applicant that the applicant is a bona fide dealer in new motor vehicles, used motor vehicles, new recreational vehicles, used recreational vehicles, motor homes, travel trailers, trailers, semitrailers, pole trailers, motorcycles, quadricycles, or special mobile equipment;

(h) if the applicant is seeking a new motor vehicle dealer's license:

(i) the name and address of the manufacturer, importer, or distributor with whom the applicant has a written new motor vehicle franchise or sales agreement and the name and make of all motor vehicles to be handled by the applicant;

(ii) the geographic location or locations, specified in writing, upon which the applicant will provide and maintain a permanent building to display and sell new motor vehicles and offer and maintain a bona fide service department for the repair, service, and maintenance of the motor vehicles; and

(iii) verification that the applicant otherwise meets the requirements of part 2 of this chapter; and

(i) if the applicant is applying for a new recreational vehicle dealer's license, new travel trailer dealer's license, or new motor home dealer's license, certification that the person is recognized by a manufacturer, importer, or distributor as a dealer in new recreational vehicles, new motor homes, or new

travel trailers.

(5) If an applicant for a new motor vehicle or used motor vehicle, new or used recreational vehicle, new or used motor home, new or used travel trailer, or trailer dealer's license wants to maintain more than one established place of business, the applicant shall file a separate license application for each proposed place of business and otherwise qualify for licensure at each place separately.

(6) Each application under this section must be accompanied by an application fee of \$5 and one or more of the following license fees based on the type of dealer's license being sought:

- (a) \$25 for a new motor vehicle dealer's license;
- (b) \$25 for a used motor vehicle dealer's license;
- (c) \$25 for a new or used recreational vehicle, motor home, or travel trailer dealer's license; or
- (d) \$25 for a motorcycle or trailer, semitrailer, or pole trailer dealer's license.

(7) The applicant for a dealer's license shall also file with the application a bond of \$50,000 for a license as a new motor vehicle dealer, a used motor vehicle dealer, a new or used recreational vehicle, motor home, or travel trailer dealer, or a trailer dealer. Applicants for a motorcycle dealer's license shall file a bond in the sum of \$15,000. All bonds must be conditioned that the applicant shall conduct the business in accordance with the requirements of the law. The bond may extend to any other type of dealer license issued to the applicant at the same geographic location if all types of licenses are indicated on the face of the bond. All bonds must be approved by the department, must be filed in its office, and must be renewed annually.

History: En. Subd. 5, Sec. 1, Ch. 158, L. 1933; re-en. Sec. 1759.4, R.C.M. 1935; amd. Sec. 2, Ch. 72, L. 1937; amd. Sec. 2, Ch. 245, L. 1955; amd. Sec. 3, Ch. 256, L. 1965; amd. Sec. 1, Ch. 354, L. 1969; amd. Sec. 2, Ch. 226, L. 1971; amd. Sec. 2, Ch. 244, L. 1971; amd. Sec. 1, Ch. 535, L. 1977; R.C.M. 1947, 53-118(part); amd. Sec. 1, Ch. 73, L. 1979; amd. Sec. 47, Ch. 421, L. 1979; amd. Sec. 2, Ch. 443, L. 1981; amd. Sec. 1, Ch. 282, L. 1985; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 27, Ch. 516, L. 1985; amd. Sec. 1, Ch. 179, L. 1989; amd. Sec. 1, Ch. 523, L. 1989; amd. Sec. 2, Ch. 383, L. 1991; amd. Sec. 14, Ch. 724, L. 1991; amd. Sec. 9, Ch. 482, L. 1993; amd. Sec. 1, Ch. 220, L. 1997; amd. Sec. 1, Ch. 221, L. 1997; amd. Sec. 84, Ch. 51, L. 1999; amd. Sec. 21, Ch. 409, L. 1999; amd. Sec. 1, Ch. 201, L. 2001; amd. Sec. 4, Ch. 385, L. 2001; amd. Sec. 3, Ch. 299, L. 2003; amd. Sec. 154, Ch. 542, L. 2005; amd. Sec. 102, Ch. 596, L. 2005.

Provided by Montana Legislative Services